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October 14, 1999

VIA HAND DELIVERY

Magalie Salas, Esquire
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. - Room TW-B204
Washington, D.C. 20554

Re: PR Docket 92-235

Dear Ms. Salas:

On behalf of Forest Industries Telecommunications (FIT), we are filing its Reply to Joint Opposition to Petition for Partial Reconsideration on the above referenced Docket proceeding.

Please communicate with us if additional information is required.

Very truly yours,

FLETCHER, HEALD & HILDRETH, PLC

George Petrutsas
Counsel for
Forest Industries Telecommunications

GP:cej
Enclosures
cc: Service List

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them.	)	PR Docket No.92-235
and	)	
Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services	)	

To: The Commission

REPLY TO JOINT OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

FOREST INDUSTRIES
TELECOMMUNICATIONS

George Petrutsas
Paul J. Feldman
Its Attorneys

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October 14, 1999

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Summary

Forest Industries Telecommunications (FIT) has petitioned for reconsideration of that part of the Commission's decision in its Second Memorandum Opinion and Order in this proceeding which designated the Petroleum and the Power frequency coordinators as the mandatory coordinators for the frequencies in the 150-170 and in the 450-470 MHz bands previously shared by the former Power, Petroleum, Forest Products, and certain other former Industrial Radio Services. This action revoked FIT's authorization to coordinate to completion practically all of the frequencies FIT had coordinated for the members of the forest products industries for over fifty years. FIT has shown that the Commission's decision was adopted without compliance with the notice and comment requirement of the APA, that the decision was unnecessary in that a less extreme alternative had been proposed by the petroleum industry itself, which alternatives FIT had supported, that the decision was inconsistent with the Commission's stated goal in the proceeding to provide competition in the coordination service, and that the decision would be harmful to the forest products and to other industries. The Commission, by its Fourth Memorandum Opinion and Order, released on August 4, 1999, in the proceeding stayed the effectiveness of the decision at issue.

FIT's Petition for Reconsideration has been opposed by API, UTC and AAR in a Joint Opposition. As demonstrated in the text, however, there is nothing in that Joint Opposition which would require or indeed warrant denial of FIT's petition for reconsideration. The "logical outgrowth" theory propound in that Opposition is not applicable here. The "horrible example" set out in the Joint Opposition at best are not substantiated and, in any event, those results could have been avoided if current

coordination procedures had been followed. Moreover, those procedures can be improved further by the adoption of a concurrence procedure along the lines of that proposed by API itself in its Petition for Reconsideration of the Commission's Second Report and Order in this proceeding. FIT urges the Commission to grant its own reconsideration petition and set aside the revisions to Section 90.35(b), and to proceed with consideration of the alternatives recommended therein.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them.	)	
	)	PR Docket No.92-235
and	)	
	)	
Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services	)	

To: The Commission

REPLY TO JOINT OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

Forest Industries Telecommunications ("FIT"), by counsel, hereby files this Reply to the Joint Opposition to Petition for Partial Reconsideration filed jointly by the United Telecom Council ("UTC"), the American Petroleum Institute ("API") and the Association of American Railroads ("AAR") on September 30, 1999 in the above-captioned proceeding ("Joint Opposition"). That filing opposed a Petition for Partial Reconsideration filed by FIT on July 16, 1999 ("Recon Petition") seeking reconsideration of that part of the Second Memorandum Opinion and Order, ("*Second MO&O*") released in the above-referenced proceeding on April 13, 1999, FCC 99-68, which amended Section 90.35(b) of the Commission's Rules and designated the petroleum and power frequency coordinators as the mandatory coordinator(s) for the

frequencies in the 150-160 and 450-470 MHz band which were shared by the former Power, Petroleum, and the Forest Products Radio Services, prior to the consolidation of the private land mobile radio services by the Commission's *Second Report and Order* in this proceeding.

I. The Joint Opposition Failed to Undercut FIT's Demonstration that the Revision To Section 90.35(b) Was Arbitrary and Enacted in Violation of the APA.

In its Recon Petition, FIT demonstrated that the new rule at issue was enacted in a manner inconsistent with the requirements of the Administrative Procedures Act, in that the revisions to Section 90.35(b) adopted in the *Second MO&O* were adopted without proper prior notice and without giving FIT and similarly effected parties a reasonable opportunity for comment, and in that the Commission did not provide a rational justification for its decision. The amendment to the rule was not within the scope of any proposals in the record on which the Commission's decision was based. It was not proposed in the original Notice of Proposed Rulemaking, in any of the comments responding to the *Notice*, in any petitions for reconsideration, nor in any of the comments on these petitions. It was not requested by API, UTC, or AAR. It was not within the scope of nor was it a reasonable reply to API's Petition for Reconsideration: API had asked only for the opportunity to concur on applications for systems on previously shared frequencies that would place a potentially interfering signal within the service area of existing petroleum systems. The Commission, instead, without a rational explanation, adopted the much more far reaching amendment to Section 90.35(b) at issue here: giving exclusive coordination authority over formerly

shared frequencies, not only to API, but to UTC, AAR and to the American Automobile Association.

The Joint Opposition proffers a number of arguments in an effort to undercut FIT's demonstration that the revision to Section 90.35(b) was arbitrary and in violation of the APA, but these arguments are fatally flawed. First, the Joint Opposition sets up a "straw man" argument on behalf of FIT, which it then attempts to knock down with a reference to AT&T Corp. v. FCC, 1999 U.S. App. Lexis 11370, 113 F.3d 225 (D.C. Cir.1997). Specifically, the Joint Opposition asserts that FIT "is apparently of the opinion that an agency may never substantially revise a rule on reconsideration without soliciting additional comment through a further notice of proposed rulemaking." Joint Opposition at page 7. But FIT made no such argument. Moreover, the AT&T case does not support the Joint Opposition or the Commission's action. In AT&T Corp., unlike here, the issue was whether the Commission's interpretation of a rule previously adopted in an earlier phase of the proceeding was reasonable. As the court noted, the Commission, in that case, "did not amend the text of the regulation". AT&T Corp., at 11376. In the case at issue, the Commission did not interpret Section 90.35(b); it changed it drastically in effect revoking FIT's authority (as well as the authority of several other coordinators) to coordinate to completion nearly 180 frequencies, most of which FIT has coordinated for nearly fifty years.

Similarly, because interpretative rulings are not subject to the APA's notice and comment requirement, the AT&T Corp. court did not need to consider that issue. However, in the present case, the revision to Section 90.35(b) was substantive, not

interpretive, so that AT&T Corp. on which the parties to the Joint Opposition so heavily rely, is largely inapplicable. Accordingly, AT&T Corp. provides no support for the position asserted in the Joint Opposition.

The changes to Section 90.35 (b) at issue were not the "logical outgrowth" of the Commission's original Notice of Proposed Rule Making, as the Joint Opposition also argues. While the Commission in its original *Notice* undertook a broad investigation of the private land mobile radio services, the relevant issues and the comments thereon have been addressed and have been disposed of in the Commission's First Report and Order and in the Second Report and Order in the proceeding. The change to Section 90.35(b) to which FIT objects was not requested or suggested in any of the comments, in any petition for reconsideration, nor indeed was it requested by UTC, API or AAR. Accordingly, nothing in the proceeding, including the original Notice of Proposed Rule Making, provided reasonable notice to the public, including FIT, that the Commission contemplated the kind of drastic change the Commission adopted which could, among other things, put FIT out of business, nor did the record provide a sound basis for the Commission's revision of Section 90.35(b).

In Natural Resources Defense Council v. United States Environmental Protection Agency, 824 F2nd 1258, 1283-84 (1st Cir. 1987), the court summarized the applicable law as follows:

> A final rule which contains changes from the proposed rule need not always go through a second notice and comment period. An agency can make even substantial changes from the proposed version, as long as the final changes are "in character with the original scheme" and "a logical outgrowth"

> of the notice and comment. *South Terminal Corp. v. EPA*, 504 F.2d 646, 658 (1st Cir. 1974); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. Denied*, 444 U.S. 1096, 100 S.Ct. 1063, 62 L.Ed.2D 784 (1980).
>
> The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. We must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing. Thus, where the final rules "are a result of a complex mix of controversial and uncommented upon data and calculations," remand may be in order. *Similarly, where the Agency adds a new pollution control parameter without giving notice of intention to do so or receiving comments, there must be a remand to allow public comment.* . . . . . (Italics in the original.)

quoting, in part, from BASF Wyandotte v. Costle, 595 F.2d 637, 642, (1st Cir. 1974).

The court went on to say:

> Here, since the concept of a separate rule setting limits on ground water was never presented to the public, nor were the final ground water protection requirements ever opened for public comment, we are convinced that given a new opportunity to comment, commenters would "have their first occasion to offer new and different criticisms which the Agency might find convincing . . . .

Natural Resources Defense Council, at 1284.

If FIT and others had been given a fair opportunity to comment on the change to Section 90.35(b) the Commission adopted, that would certainly have been its first occasion for FIT and others to offer arguments against adoption of that rule which the Commission might find convincing, i.e., that such a rule was unnecessary, that less onerous alternatives are available, etc. FIT has had no such previous opportunity. Cf. American Water Works Ass'n. v. FPC, 40 F.3rd 1266, 1274; and AT&T v. FCC, 974 F.2nd

1351, 1354 (D.C. Cir. 1992); Rodway v. U.S. Dept. of Agriculture, 567 F.2nd 809 (D.C. Cir. 1975). See also, Chocolate Mfrs. Ass'n of the U.S. v. Block, 755 F.2nd 1098 (4th Cir. 1985).

See, also, American Frozen Food Institute v. Train, 539 F.2d 107, 1375(D.C. Cir. 1976), where the court observed:

> "In one instance, the EPA has clearly failed to solicit or allow for public comment. The Development Document identified only three pollutants as to which measures of control were proposed. In the final regulation, EPA added a fourth pollutant . . . and prescribed a limitation for it. No prior notice of intention to add (the fourth pollutant) to the list . . . had been given to the industry or to the public and, of course, no comments had been solicited or received. This failure, we believe, was violative of the Administrative Procedures Act, 5 U.S.C. § 553 (1970) . . . ."

See also, BASF Wyandotte v. Costle, at 642 where the court stated:

> "Where the Agency adds . . . . a pollution control parameter without giving notice of intention to do so or receiving comments, there must be a remand to allow public comment.

Clearly, the Commission in its Second Memorandum and Order added a very important, substantive restriction to Section 90.35(b). This was in violation of the APA since the Commission did not provide reasonable prior notice and an opportunity for comments thereon.

The argument in the Opposition, pp. 11-12, that since the Commission could have adopted a third pool in an earlier phase of the proceeding, FIT and others were on notice that the Commission might adopt the revision of Section 90.35(b) at issue defies logic. The Commission declined to adopt a third pool and API did not request anything

resembling a third pool in its reconsideration petition and, of course, did not request anything resembling exclusive coordination authority. It would have taken a long leap in logic for FIT, and the remaining land mobile industry to have assumed that the Commission was about to adopt the changes to Section 90.35(b) which can, if left undisturbed, put them out of business. Therefore, under the rationale of the cases summarized above, the changes to Section 90.35(b) can not possibly be considered an "outgrowth" of previous actions in the proceeding, much less a "logical" outgrowth.

The Commission's decision to adopt the drastic change to Section 90.35(b) was contrary to the APA for yet another reason. As the court observed in Natural Resources Defense Council, at 1259:

> ". . . in order for a rule to be upheld against a substantive challenge . . . . the Agency must give an adequate explanation of why the rule was promulgated in its final form. . . ."

As it has been shown in the Recon Petition, the Commission's explanation for its adoption of the substantive changes to Section 90.35(b) was neither adequate nor reasonable.

II. The Joint Opposition Fails to Undercut the Showing in the Recon Petition That The Revision to Section 90.35(b) Will Harm the Forest Products Industry, FIT, and the Goal of Competitive Coordination.

In its Recon Petition, and in its Petition for Partial Stay, filed by FIT on July 9, 1999, in this proceeding, an extensive showing was made that the revision to Section 90.35(b) will harm the forest products industry, FIT, and the Commission's goal in this proceeding of promoting competition in the coordination of frequencies. Indeed, the Commission recognized the likelihood of such harm in its Fourth Memorandum Opinion

and Order in this proceeding. FCC 99-203, released August 5, 1999, at para. 14. Nothing in the Joint Opposition undercuts this showing of likelihood of harm.

First, the Joint Opposition attempts to shift the focus and provides examples of problems that have allegedly occurred "due to inadequate coordinations conducted by [coordinators other than UTC, AAR or API]." Joint Opposition at pages 13-15. These examples are unsupported by declaration or verification by a party with direct knowledge, and generally lack specific facts sufficient to identify and verify the alleged incidents. In the first five examples presented in the Joint Opposition, the coordinators were not identified, but apparently did not include FIT or MRFAC who have safely and successfully coordinated the very same frequencies for over fifty years.

Worse than the unsupported and vague allegations regarding other coordinators, is the Joint Opposition's single reference to an application coordinated by FIT. The implication therein that FIT improperly coordinated an application that "poses a significant risk of interference" to nearby petroleum operations is inconsistent with the facts. The facts are described in the attached letter. Briefly, the petroleum company's application had not appeared in the coordinators' database when FIT coordinated the co-channel application. Moreover, the frequencies involved, 452.150 and 452.825 MHz, are not among those previously shared by the former Petroleum Radio Service so that, even if the changes to Section 90.35(b) were in effect, the petroleum coordinator would not have been one of the mandatory coordinators for those frequencies. In any event, the conflict in that case is being resolved in the manner such matters should be resolved, through the cooperation of the parties. Therefore, FIT is somewhat surprised

that the parties to the Joint Opposition would present to the Commission such irrelevant and factually questionable arguments in the pursue of their goal.

The Joint Opposition suggests that the revision to Section 90.35(b) is not harmful to FIT, the forest products industry, or to competition in coordination. This argument is also meritless. The Joint Opposition notes that the new rule allows MRFAC and FIT to continue to coordinate systems on formerly shared channels, as long as the concurrence of the appropriate UTC, API or AAR coordinator is also obtained. However, there is no evidence that concurrence from UTC, API or AAR will be provided without charge, and such generosity is unlikely as those entitles will have to recover the costs for providing their concurrences. The practical result is that operators that wish to use FIT as a coordinator will have to pay for coordination by two coordinators (FIT and the concurring coordinator), while they would only have to pay one charge if they go directly to UTC, AAR or API. This imposes a significant competitive disadvantage on FIT, and unnecessary costs on FIT's clients. Under such a regime, forest products entities would have the Hobson's choice of either paying two coordination fees or giving up the services of the coordinator that has coordinated land mobile systems for the industry for over fifty years and is the expert on its specialized communications requirements.

Equally unpersuasive is the assertion on page 18 of the Joint Opposition that members of the forest products industry operators would not risk losing access to the frequencies they now use even though power and petroleum coordinators would have been given authority to deny access to those frequencies to non-petroleum, non-utility

entities. The Joint Opposition argues that power and petroleum coordinators would not unreasonably deny the use of such frequencies to non-petroleum and to non-power applicants because they would have to give a written explanation for denying a requested frequency. However, as the Commission well knows, coordination of a frequency is sometimes as much art as science, and a written explanation can be composed in a manner that justifies a coordinator's refusal to coordinate a particular frequency. In this situation, a coordinator naturally would be inclined to preserve to the greatest degree the use of frequencies for the industry the coordinator represents.

Finally, the suggestion in the Joint Opposition that the Commission consider adopting the protected contour concurrence approach recommended in API's Petition for Reconsideration in addition to exclusive coordination is unacceptable. FIT supported the protected contour concurrence approach for the protection of existing systems. However, FIT submits that adding to it the exclusive coordination would make Section 90.35(b) even more onerous in that such an action would add yet another level of burden onto the forest products industry and on other users. FIT suggests that the Commission adopt the less onerous API protected contour trigger for concurrence approach, instead of the approach adopted in the *Second MO&O*. Such a requirement, which should include the forest products industry, as FIT has urged, would adequately protect existing safety related land mobile communications facilities.

III. Conclusion

FIT recognizes and supports the need to protect legitimate safety uses of private radio frequencies. But "safety" should not be used as an unexamined basis for the adoption of the kind of restrictive rules involved here, without prior notice under the APA

and without solid underpinnings. The changes to Section 90.35(b) at issue will unnecessarily harm the forest products and other industries and many users, and will reduce competition in the provision of coordination services. FIT is grateful that the Commission wisely recognized, in the *Fourth Memorandum Opinion and Order* in this proceeding, that these harms are likely real and unnecessary. FIT thus urges the Commission to reverse its action in the *Second MO&O*, and to propose instead adoption of the type of protected contour concurrence approach suggested by API in its Petition for Reconsideration and that such a requirement should include existing systems licensed to members of the forest products industry.

Respectfully submitted,

FOREST INDUSTRIES TELECOMMUNICATIONS

By: _____

George Petrutsas
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ATTACHMENT

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September 14, 1999

Wayne V. Black, Esquire
Keller & Heckman LLP
1001 G Street, N.W.
Washington, D.C. 20001

Re: FIT's Coordination of
Baytown Communications's
application on 452.150 and 452.825 MHZ

Dear Wayne:

I have looked into this matter and here is what happened. First, your letter and the Baytown coordination file had been misplaced at FIT so that Kenton Sturdevant did not become aware of it until I called him. As for me, I was out from August 6 to September 7, 1999. My apologies for the delay of this response.

It appears that the application of the Shell Chemical Company was coordinated by ITA and it was filed with the FCC before the Baytown application was coordinated. (The Shell application was filed on or about 9/17/98, the Baytown's was filed on or about 11/6/98. Shell's application apparently was granted on January 26, 1999, Baytown's on April 5, 1999.)

Baytown's engineering consultant conducted its engineering analysis in September with frequency data as of September 9, 1998, before Shell's application was coordinated. According to FIT, a final review of the CET's data by FIT on November 4, 1988, shortly before Baytown's application was sent to the Commission, did not show the coordination data for Shell's application. Finally, FIT routinely notified ITA (and all other coordinators) of its coordination of the frequencies in question for Baytown but ITA did not object or otherwise raise an issue within the prescribed 10-day period. Indeed, ITA said nothing until apparently you raised the issue in June.

In any event, Baytown's application was coordinated under previous Section 90.187 which did not prescribe 21/39 dBu type of protection.

Nevertheless, it appears that the Baytown station would overlap Shell's 39 dBu contour. Therefore, the issue now is what to do about the matter. Baytown has the option of changing the system from a centralized to a decentralized trunked system and it would then not be inconsistent with the FCC rule. Alternatively, Shell may want to delete the two frequencies in question and operate the facility on the remaining fourteen frequencies. (FIT understands that ITA coordinated and FCC assigned to Shell sixteen (16) channel pairs to accommodate only 75 mobile units. If so, there is room for flexibility on the part of Shell.)

These appear to be the facts. The cause of the current problem was that the Shell application did not appear in the coordination data base when FIT coordinated the Baytown application.

I trust this is responsive to your June letter to F.I.T. and, again, I regret the delay of our response.

Sincerely,

George Petrutsas

GP:cej

cc: Kenton Sturdevant

FILE: Forest Industries Telecom #1

CERTIFICATE OF SERVICE

I, Chellestine Johnson, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C. do hereby certify that true copies of the foregoing Reply to Joint Opposition to Petition for Partial Reconsideration were sent this 14th day of October, 1999, by first-class United States mail, postage prepaid, to the following:

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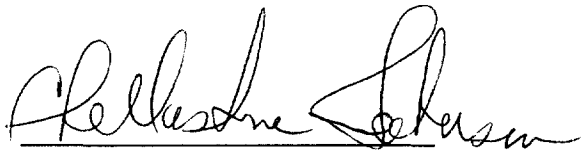

Chellestine Johnson